

AMAX COAL CO.

IBLA 83-614  
IBSMA 81-44

Decided June 28, 1983

Petition for review filed by AMAX Coal Company from the January 14, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. IN 0-40-P. That decision upheld Notice of Violation No. 80-III-11-5, issued for failure to control discharges from a sedimentation pond in violation of 30 CFR 715.17(f), and assessed a \$200 civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally

30 CFR 715.17(f) is a preventive measure, and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of its requirement.

APPEARANCES: Robert L. Trierweiler, Esq., Indianapolis, Indiana, for Amax Coal Company; Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, John C. Martin, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On February 18, 1981, Amax Coal Company (AMAX) filed for review of a January 14, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. IN 0-40-P. The decision upheld Notice of Violation No. 80-III-11-5 issued to AMAX by the Office of Surface Mining Reclamation and Enforcement (OSM) for an alleged violation of 30 CFR 715.17(f), a regulation partially implementing section 515 of the Surface Mining Control and Reclamation Act of 1977. <sup>1/</sup> The decision also assessed a civil penalty of \$200. For the reasons set forth below, we affirm that decision.

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<sup>1/</sup> Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

### Background

On February 11, 1980, OSM inspected AMAX's Sunspot-Ipava surface mine in Fulton County, Illinois. AMAX had diverted water from Francis Creek, a perennial stream on the site, through its sedimentation pond. Discharges from the pond, which included the entire flow of Francis Creek, passed through a 150- to 250-foot long primary spillway before returning to the original creek bed. The OSM inspector discovered that the primary spillway had eroded and that no measures had been taken to prevent erosion by reducing the speed of the water leaving the pond. He therefore issued Notice of Violation No. 80-III-11-5, charging AMAX with "failure to have discharges from a sedimentation pond controlled to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance" in violation of 30 CFR 715.17(f). The notice related to "the primary spillway of the Ipava settling basin" and required AMAX to "control the primary spillway discharges to reduce erosion and to prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance." A civil penalty of \$1,100 was later assessed for this violation.

AMAX sought review of the notice and civil penalty. A hearing was held on November 19, 1980, and a decision was issued on January 14, 1981, which upheld the notice but reduced the civil penalty to \$200. AMAX's February 18, 1981, petition for discretionary review of that decision was granted on March 4, 1981. In that petition, AMAX did not challenge the amount of the civil penalty assessed in the January 14, 1981, decision. Both parties filed briefs; Amax was granted leave to file a reply brief. Later both parties were invited to file supplementary briefs. 2/

### Discussion and Conclusions

30 CFR 715.17(f) states: "Discharge structures. Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion

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2/ A July 28, 1981, order authorized briefs limited to the following:

"Would erosion of the spillway leading from the sedimentation pond to the bed of Francis Creek constitute a violation of 30 CFR 715.17(f)? In addressing this question, please note and discuss the fact that 30 CFR 715.17(d)(1) refers to a new 'stream channel' where there is diversion of a perennial stream, as there is here."

AMAX contends both in its reply brief and in its supplementary brief that because OSM did not appeal the Administrative Law Judge's ruling on this issue, OSM cannot raise it and the Board cannot decide it. We reject that contention. The issue before the Administrative Law Judge was whether the evidence showed that 30 CFR 715.17(f) had been violated. The same issue and record are before this Board. That is sufficient for us to consider the matter. We are not limited to any particular theory of the Administrative Law Judge or the parties concerning our determination. 5 U.S.C. § 557(b)(1976).

and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance." The parties' positions have been consistent throughout this case. At the hearing, OSM and AMAX stipulated that there had been erosion to the primary spillway but that there had not been disturbance of the hydrologic balance. OSM argues that, because AMAX constructed its sedimentation pond in the original bed of Francis Creek, the primary spillway that carries water from the dam back to the original bed is properly viewed as part of the stream channel of Francis Creek. Alternatively, OSM urges that erosion of the primary spillway would cause erosion of the channel and disturbance of the hydrologic balance in the future, when the erosion of the spillway meets the original bed below the dam. AMAX argues that the primary spillway is part of the structure of the sedimentation pond and is not a stream channel and that erosion of the spillway is not the kind of event covered by 30 CFR 715.17(f). The decision below rejected OSM's first argument but accepted the second. 3/

[1] We agree with the decision below that it is not reasonable to view a spillway as a stream channel within the meaning of the regulation. We further agree that the regulation is intended to cause sedimentation ponds, including spillways, to be constructed so that deepening or enlargement of stream channels will be prevented. The record of this case supports the Administrative Law Judge's conclusion that such damage to the original bed of Francis Creek below the spillway could occur unless preventive measures were taken. See, e.g., Tr. 30-31, 40, 42-43, 46, 49. It is not necessary for this damage to occur before OSM can order the installation of rip-rap or other preventive measures under 30 CFR 715.17(f). Proof that the adverse impacts that the regulation is designed to prevent have actually occurred is not necessary to establish a violation. Belva Coal Co., Inc., 3 IBSMA 83, 88 I.D. 448 (1981); Kaiser Steel Corp., 2 IBSMA 158, 87 I.D. 324 (1980). It is sufficient to show that if the condition giving rise to the violation were left unabated, the damage that the regulation is designed to prevent might occur.

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3/ The decision at page 3 reads in part:

"The respondent advances two theories as the basis for the issuance of the notice of violation. It is first argued that when the petitioner constructed the spillway that it thereby became a 'stream'. \* \* \*

"30 CFR section 715.17(f) refers to discharge structures and I take this to mean that such are to be distinguished from 'streams', otherwise all discharge structures would be classified as streams and I am of the opinion that this is not the import or intent of the regulations. It would therefore follow that erosion of a discharge structure per se is not a violation of 30 CFR Section 715.17(f).

"The respondent next argues that the potential for erosion to a natural stream channel i.e., Francis Creek, existed. Although no damage had occurred, given enough water and time, and without any corrective action, damage to Francis Creek could occur. I am of the opinion that the testimony and evidence in the record sustains this point. I so find and therefore affirm the violation as validly issued."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, 4/ the January 14, 1981, decision of the Administrative Law Judge is affirmed.

Will A. Irwin  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

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4/ In Secretarial Order No. 3092, dated Apr. 26, 1983, the Secretary transferred all functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals to the Board of Land Appeals. 48 FR 22370 (May 18, 1983).